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No. 80-274

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SANTA CLARA,
Respondent,

ALLEN LEROY ENGERT and JOHN WAYNE GAMBLE,
Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI

to the Court of Appeal of the
State of California,
First Appellate District, Division Four

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QUESTION PRESENTED

Whether the death penalty special circumstance of California Penal Code section 190.2, subdivision (a)(14)—"[t]he murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity . . ."—is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Four, which may be found at 105 Cal.App.3d 364, 164 Cal.Rptr. 210 (1980), appears as Appendix A to this petition.

JURISDICTION

The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, Division Four, which was entered in this proceeding on May 1, 1980. The Court of Appeal denied petitioner's petition for rehearing on May 29, 1980 (Appendix B), and the decision became final June 30, 1980. (Rules 24(a) and 28, California Rules of Court). The California Supreme Court denied the People's petition for hearing on June 25, 1980 (Appendix C). The remittitur, due to be issued on July 1, 1980, the sixty-first day after the opinion was filed, was ordered stayed on June 30, 1980 pending petition for writ of certiorari to this court (Appendix D). This petition for writ of certiorari was filed within 60 days of June 25, 1980. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE STATE COURTS

Real parties in interest Allen Leroy Engert and John Wayne Gamble are charged in separate prosecutions with murder and the special circumstance of California Penal Code section 190.2, subdivision (a)(14) is alleged as to each defendant. Defendants in separate pretrial proceed-

ings challenged the special circumstance quoted in footnote 3, p. 12 on the ground it was void for vagueness under the due process clause. Respondent, the Superior Court of Santa Clara County, ruled in each case that the challenged special circumstance is void for vagueness under due process requirements of both the California and Federal Constitutions.

Petitioner, the People of the State of California, petitioned the State Court of Appeal, First Appellate District, for writ of mandate in each case to set aside the judgment on demurrer/motion to strike entered by respondent court. The Court of Appeal, First Appellate District, Division Four, issued alternative writs of mandate (Cal.Code of Civ.Proc. § 1087). By published decision filed May 1, 1980, a two-justice majority concluded respondent court acted properly in granting the demurrer/motion to strike the special circumstance of California Penal Code section 190.2, subdivision (a)(14). The third justice of the Court of Appeal, in a dissenting opinion, concluded that the special circumstance was not unconstitutionally vague.

The People of the State of California petitioned for rehearing on May 15, 1980, but rehearing was denied on May 29, 1980 (Justice Poche was of the opinion rehearing should have been granted) (Appendix B).

A petition for hearing on denial of writ of mandate was timely filed in the California Supreme Court on June 10, 1980. The petition for hearing in the State Supreme Court was denied on June 25, 1980 (Justices Clark and Richardson were of the opinion the petition for hearing should have been granted) (Appendix C).

A petition for stay of issuance of the remittitur and for an order staying the execution and enforcement of the judgment was filed in the First Appellate District Court of Appeal of the State of California, Division Four, on June 27, 1980, and was granted by the Court on June 30, 1980 (Appendix D). The People of the State of California have throughout the state court proceedings maintained that the special circumstance in question is not unconstitutionally vague, primarily relying on *Proffitt v. Florida* 428 U.S. 242 (1976).

B. STATEMENT OF FACTS ADDUCED AT THE PRELIMINARY EXAMINATIONS

1. Defendant Engert

Mr. Orville Wimberly left for work about 5:00 p.m. on May 15, 1979 (PT 52b). When he left the apartment his girlfriend, Adria Manning, was in the bedroom and "[s]he was a little bit intoxicated, but other than that, in reasonably good shape" and alive (PT 52b). She was wearing then a white nightgown with "some design in it" (PT 53b). She smoked in bed and had on occasion burned herself with cigarettes (PT 53b-54b). She had burn marks on her upper torso from falling asleep while smoking (PT 54b).

Wimberly returned home from work about 7:00 a.m. on May 16, 1979. Entering the apartment, he discovered it had been ransacked. He found Adria Manning in the bedroom with a towel and rope around her neck. She appeared dead. Wimberly called the police and emergency squad. He removed the strip of towel and rope from her neck (PT 54b, 63b). Ms. Manning was wearing a nightgown different from the one she was wearing when Wimberly left for work (PT 53b).

San Jose Police Officer Confer was assigned on May 16, 1979 to investigate a homicide at the Wimberly-Manning apartment. The officer lifted a latent fingerprint from a vodka bottle found in the bedroom where decedent Manning was found. Officer Confer also lifted a latent fingerprint from the box for the Kodak instamatic camera which was missing. The latent prints were submitted for comparison (PT 111b-113b) and were determined to be those of defendant Engert (PT 50c-54c).

County Coroner John Hauser performed an autopsy on the body of Adria Manning on May 16, 1979 (PT 4b) and described an injury to the neck as a "band-like mark that almost completely encircled the neck. The marks showed abrasion, that is, a scraping of the skin." Further, "there was a bruising of the tissues of the front of the neck, particularly in the area of the larynx and there was a fracture of the right horn of the hyoid bone." (PT 11b).

The band-like marks encircling the neck were double in some places and there were smaller adjacent marks. There was bleeding into the structures of the larynx. The band-like marks around the neck were consistent with strangulation by some type of ligature, strap or rope being pulled tight around the neck. The doctor emphasized the marks were not consistent with hanging as a fracture of the hyoid bone is not a characteristic injury of hanging (PT 14b-15b). Strangulation by ligature was the cause of death (PT 16b).

There were other injuries; small abrasions on the forehead and the lips. The lips were swollen and scraped. The lip injuries were consistent with the victim's lips having been rubbed against some fabric such as bedclothing.

Impact with a hand or fist against the lips was probably not the cause as no bruising was evident (PT 17b). The lip injury was recent or fresh (PT 18b).

There were fresh bruises to the scalp and forehead of the victim. These were caused by "some sort of bump" (PT 18b). There were five such injuries and so falling was not a likely cause as the victim would have to have fallen five times (PT 19b).

There were a number of burn wounds in various states of healing (PT 19b).

The wrists showed injuries, purplish bruises extending partly around the wrists. Dimensions of the wrist marks were one-quarter inch wide; two were two inches long and another three inches long extending around the wrist (PT 20b). These injuries had a band-like appearance which means they too were produced by ligature (PT 20b).

The next significant injury observed was in the victim's anus. There was blood and bloody material on the surface of the skin around the anus. Examination of the interior disclosed abrasions or scraping in the lining of the mucosa, the lining of the bowel. The lining was also torn. The abrasion extended upward into the interior of the bowel cavity about three inches (PT 21b-22b). Dr. Hauser later analyzed brownish material on the wooden handle of a hammer found on the deceased's bedroom floor (PT 127b). Upon analysis he determined the material on the hammer handle to be "colonic mucosa", the lining of the large bowel (PT 23b). The presence of colonic mucosa on the hammer handle end would be consistent with the hammer handle end having been inserted into the rectum of Adria Manning (PT 23b-

24b). The injury was not consistent with insertion of a penis (PT 25b). The scraping and tear to the bowel lining were caused by a hard or very angular surface. No semenal matter was found inside either the rectum or vagina of the victim (PT 25b).

Dr. Hauser opined that Adria Manning was alive at the time she suffered the neck injury as there was a "vital reaction"—bleeding at the injury sites. There was a "good bit" of bleeding in the neck area. As to the injury to the anus, there was bleeding at this location on Adria Manning's body also. But compared to the neck area, the degree of bleeding in the anal area was less. Due to his observation there was more bleeding in the neck area than the area of the anus, Dr. Hauser concluded the neck injury preceded the anal injury (PT 29b-31b). The bleeding in the anus indicated Adria Manning "wasn't really dead or there wouldn't be any bleeding at all other than what you get by gravity." (PT 31b).

2. Defendant Gamble

On August 9, 1979, Dr. Richard Mason performed an autopsy on the body of Shanean Hall, a 2-year-old black girl (PT 8-9). External examination disclosed three bruises on the forehead (PT 11), a one-quarter inch abrasion on the mid-lower lip (PT 13), and three one-half inch bruises on the left front chest (PT 14). In addition, there were multiple one-eighth to one-half inch bruises in the area of the abdomen (PT 16). Abrasions were present which would be consistent with application of pressure by fingernails (PT 16). The doctor discovered "some needle puncture wounds" in the right groin and a contused area

in the left groin also possibly related to needle puncture wounds (PT 17).

Dr. Mason found no trauma to the child's vagina, but the child's rectum was dilated, stretched, and he found a small amount of fecal matter with blood behind it (PT 17-18). After cleaning the rectal area, the doctor found "an abrasion completely encircling the rectal sphincter with the skin actually rubbed off, and there was a small amount of hemorrhage in the skin." (PT 54.) His examination of the rectum interior disclosed stretch trauma in the rectum behind the sphincter and hemorrhage in the mucosal lining of the interior. The doctor opined that "a large cylindrical object was jammed in there and it scraped the skin and it stretched the inside of the rectum causing hemorrhage in that area." (PT 19.) The diameter of the object inserted had to be greater than an inch and a half and would have been consistent with either a broom handle or a penis (PT 19).

Dissection of the skull disclosed seven separate bruises within the scalp (PT 21-22). Removal of the top of the skull revealed a bilateral subdural hematoma (bleeding between surface of brain and skull) 20 cc. in volume, covering a 2½ square inch area on either side of the brain. He also observed swelling of the brain (PT 23-24). The hemorrhages were caused by the direct application of force to the head (PT 25).

Internal examination of the abdominal cavity revealed 200 c.c. of liquid blood. There was a ¾ x ¾ inch laceration in the middle of the liver at the point of attachment. This wound was inflicted by a blow to the abdomen. Other

organs in the mid-abdomen region had been injured by a forceful blow, i.e., the large bowel or tranverse colon had been crushed and bruised, and loops of the small bowel and pancreas had been bruised (PT 26). The doctor opined that "a forceful blow had been applied to the front of the abdomen pushing these soft tissue organs inwards and smacking them against the backbone" (PT 26). The injuries were consistent with multiple blows (PT 27). These injuries were all recent with fresh hemorrhaging (PT 28-29).

However, Dr. Mason also found evidence of prior injuries to the child. Specifically, "[t]here were two healing fractures involving bones of fingers, one on each hand." (PT 27.) These fractures were natural healing processes, about two weeks old, and had not received medical attention (PT 28).

The doctor's opinion as to the cause of the injuries was that the "[c]hild was beaten to death and something was jammed into her rectum." The abrasions to the torso would be consistent with someone grasping the torso of the child and penetrating the rectum with his penis (PT 30). The cause of death was "[b]lunt trauma to the head and abdomen due to multiple blows to the head and abdomen; contributory cause was abrasions and contusions of the anus and rectum." (PT 31.)

REASONS FOR GRANTING THE WRIT

In 1972, the California Supreme Court ruled the death penalty in California unconstitutional on the ground that it amounted to cruel and unusual punishment. *People v. Anderson* (1972) 6 Cal.3d 628. However, the electorate of the State of California in the November 1972 General Elec-

tion approved an initiative which added Article I, section 27 to the California Constitution which provides:

> "All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. [¶] The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 [of the California Constitution] nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution."

The California Supreme Court, in *People v. Frierson* (1979) 25 Cal.3d 142, recognized that the purpose of Article I, section 27 as approved by the voters was to conform the California death penalty law to the demands of the Federal Constitution, as expressed by this Court in *Furman* and *Gregg*, et al.[1] *Id.* at 185. Therefore, if the especially heinous, atrocious or cruel special circumstance does not violate the Federal Constitution, it cannot be invalid under the California Constitution.

The Court of Appeal majority rejected our argument that *Proffitt v. Florida, supra*, establishes the constitutionality under the Due Process Clause of the Fourteenth Amendment of the especially heinous, atrocious, or cruel death penalty standard. This Court in *Proffitt* specifically found the death penalty standard was not vague in the context of its use in the Florida statute. Petitioner urges

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[1]*Furman v. Georgia* (1972) 408 U.S. 238; *Gregg v. Georgia* (1976) 428 U.S. 153.

that the use of this death penalty standard in California also serves to provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. Since the Court of Appeal majority has ruled that the language, "especially heinous, atrocious, or cruel" is unconstitutionally vague, it has decided a federal question in conflict with decisions of this Court. See Rule 17.1(c), Rules of the United States Supreme Court.

By overwhelming vote[2] in the general election of November 7, 1978, the People of the State of California expressed their determination that the death penalty be made applicable to murders which are "especially heinous, atrocious, or cruel manifesting exceptional depravity." If the decision of the two-judge State Court of Appeal majority—the unsoundness of which has been convincingly established by the strong dissent of the third judge of the State Court of Appeal panel—is allowed to stand, the will of the People of the State of California to conform the California capital-sentencing procedure to the demands of the Federal Constitution will be irreparably frustrated. Certiorari should be granted so this court can resolve whether the "especially heinous, atrocious, or cruel" death penalty standard as used in California comports with the Federal due process clause.

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[2]See "Statement of the Vote and Supplement, General Election, November 7, 1978" compiled by March Fong Eu, Secretary of State of California, p. 39.

ARGUMENT

CALIFORNIA'S DEATH PENALTY STATUTE WHICH AUTHORIZES DEATH OR CONFINEMENT IN THE STATE PRISON FOR LIFE WITHOUT POSSIBILITY OF PAROLE FOR MURDER WHICH IS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, IS NOT VAGUE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The death penalty special circumstance ruled constitutionally invalid[3] by respondent Court had its genesis in the Florida capital sentencing statute and the Model Penal Code, upon which the Florida statute was substantially patterned. The drafters of the California statute utilized the Florida Supreme Court's construction of the terms "especially heinous, atrocious, or cruel manifesting exceptional depravity" as meaning "a conscienceless, or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon* (Fla. 1973) 283 So.2d 1, 9. The challenged special circumstance was part of Proposition 7, entitled, "Murder. Penalty—Initiative Statute", adopted by the electorate in the November 7, 1978 general election. The

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[3]In pertinent part, Penal Code Section 190.2, subdivision (a) provides: "The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under section 190.4, to be true: * * * (14) The murder was especially heinous, atrocious, or cruel manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim."

People of the State of California urged in the state courts and now urge before this Court that California's special circumstance "that the murder was especially heinous, atrocious, or cruel" in the context of the California death penalty statute, is not vague under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeal majority rejected petitioner's argument that *Proffitt v. Florida* (1976) 428 U.S. 242, disposed of the contention raised by defendants that the terms "especially heinous, atrocious or cruel" were vague and overbroad. The majority noted that this Court in *Proffitt v. Florida, supra,* had limited certiorari to the question whether the Florida statute when viewed in its entirety would result in capricious or arbitrary application of the death penalty. The majority was persuaded that this Court in *Proffitt* had considered vagueness only in the context of the Eighth and Fourteenth Amendments, thereby leaving open the broader question whether the language of the special circumstance was void for vagueness under the due process clause. The majority concluded that the "especially heinous, atrocious, or cruel" death penalty standard occupies a significantly different place in California's statutory scheme than it does in Florida's and that it was so vague as used in California that it constituted a denial of due process (App. A, at 7-9). Petitioner submits that although the California capital sentencing statutory scheme differs in certain respects from the Florida statutory scheme, the California capital sentencing scheme is still a valid post-*Furman* approach to imposing capital punishment. The

"especially heinous, atrocious, or cruel" standard, used as a "special circumstance" in California, is not unconstitutionally vague.

A. Procedural Differences

The distinction offered by the Court of Appeal majority is that a defendant accused of a capital crime is somehow at a disadvantage if he faces the "especially heinous, atrocious, or cruel" standard as a special circumstance in California, instead of as an aggravating circumstance as in Florida. The majority stated:

> "In Florida, [especially heinous, atrocious, or cruel] is one of eight aggravating circumstances. The jury is not required to make a finding on the 'especially heinous' factor: it is but one factor it is directed to consider. When the heinousness of a murder is one of several factors to be considered, there is less likelihood that the vagueness will affect the discretion of the trier of fact. In Florida, the jury is not required to choose the penalty in accordance with its finding that the crime was especially heinous. If a defendant is found guilty of a capital offense, an evidentiary hearing is held after which the jury considers whether some of the seven statutory mitigating circumstances in combination outweigh the aggravating circumstances found to exist. The sentencing choice is between death and life imprisonment, which includes the possibility of parole. The jury's decision is only advisory; the actual sentence is imposed by the trial judge." (See *Proffitt v. Florida, supra,* 428 U.S. at pp. 248-249.) (App. A, at 7-8.)

Petitioner urges that a fair comparison of the California and Florida death penalty procedures shows that the Cali-

fornia scheme is not deficient in providing safeguards to a defendant accused of a capital crime. In Florida, all first degree murder constitutes capital felony. Fla.Stat.Ann. § 782.04(1)(a). Once a Florida jury finds a defendant guilty of first degree murder, a separate proceeding is held on the issue whether the accused receives life imprisonment (serving a minimum of 25 years before becoming eligible for parole) or death. Fla.Stat.Ann. § 775.082. In short, under the Florida scheme a verdict of first degree murder alone constitutes capital felony subjecting the defendant to the possibility of a death sentence.

In California, on the other hand, a finding of first degree murder alone is insufficient to authorize the convening of the penalty phase of the trial to determine if the death penalty shall be imposed. California permits a death penalty determination only if one or more special circumstances set out in Cal.Pen. Code § 190.2 have been found true. Cal.Pen.Code § 190.1 (Added by § 4 of Initiative Measure approved November 7, 1978). A finding that a special circumstance is true must be beyond a reasonable doubt and by unanimous verdict. Cal.Pen.Code § 190.4, subdivisions (a) & (b). (Added by § 10 of Initiative Measure approved November 7, 1978).

Petitioner submits that if, as in Florida, a verdict of first degree murder alone provides a sufficient basis for subjecting an accused to an evidentiary hearing to determine if the death penalty shall be imposed, that a procedure which requires a jury to find a special circumstance beyond a reasonable doubt and by unanimous verdict before a death penalty determination hearing may be held, provides no less protection to an accused.

In both Florida and California the jury in the penalty phase of the trial is provided statutory guidelines for the determination whether the defendant shall receive life imprisonment or death. In Florida the jury is directed to consider "'[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.' §§ 921.141(2)(b) and (c) (Supp. 1976-1977) [footnote omitted]. The jury's verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that '[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' [Citations]." *Proffitt v. Florida, supra,* 428 U.S., at 248-249.

In California the determination of life without possibility of parole or death in the penalty phase of the trial is vested in the jury. The jury is directed to consider the existence of any special circumstance found to be true as well as "the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition." Cal.Pen.Code § 190.3 (Added by § 8 of

Initiative Measure approved November 7, 1978.) In short, the California death penalty sentencing scheme focuses the attention of the jury on the circumstances of the crime and the defendant and, thereby, satisfies the directive of *Furman* for avoiding arbitrarily and capriciously imposed death sentences.

The Court of Appeal majority, however, erroneously opined that the "especially heinous, atrocious, or cruel" aggravating circumstance was constitutionally valid under the Florida scheme because in Florida it is the trial judge which ultimately decides life or death (App. A, at 8). Notwithstanding the fact that under the Florida statute it is the trial judge who ultimately determines the sentence of life or death, it is also constitutionally valid for the jury to carry out this important societal function. *Proffitt v. Florida, supra,* 428 U.S. at 252; *Witherspoon v. Illinois,* 391 U.S. 510, 519 fn.15 (1968). Significantly, a jury in Florida may recommend death by only majority vote; in California, on the other hand, the death penalty may be imposed only if all twelve jurors agree. Cal.Pen. Code § 190.3; See CALJIC No. 8.84.2.

The California statute provides that "the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances . . ., and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." Cal.Pen.Code § 190.3. However, where a jury returns a verdict of death,

> "the defendant shall be deemed to have made an application for modification of such verdict or finding. . . . In ruling on the application, the judge shall review

> the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings." Cal.Pen.Code § 190.4, subd. (e).

Lastly, should the modification of the sentence of death be denied by the trial judge, such denial is reviewed by automatic appeal to the California Supreme Court. Cal. Pen.Code §§ 190.4, 1239. Since the California death penalty procedures provide jury and trial court with specific and detailed guidance for the determination whether to impose the death penalty or life without possibility of parole, and provide meaningful review of the death penalty determination, it is clear, we submit, that California now has a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not.

B. Void for Vagueness

The Court of Appeal majority determined that the words "cruel," "atrocious" and "heinous" were explained by use of terms that were even more uncertain, i.e., "conscienceless" and "pitiless". The majority also found the term "unnecessarily torturous" had no commonly understoood meaning as distinguished from "the infliction of torture." (App. A, at 4.) As petitioner pointed out, *supra,* the drafters of the California death penalty initiative adopted the meaning the Supreme Court of Florida has attached to the standard "especially, heinous, atrocious, or cruel."

State v. Dixon, supra, 283 So.2d, at 9; *Proffitt v. Florida, supra,* 428 U.S., at 255.

The Court of Appeal majority condemned the special circumstance because it was not as specific as language in a penal statute which defines a crime. But the function of a special circumstance is not to define a crime, rather its purpose is to guide the trier of fact in selecting those few cases in which the death penalty is warranted from the many in which it is not. As Justice Poche pointed out in his dissenting opinion,

> "due process commands that a penal statute must be definite enough to provide both a standard of conduct for those whose activities are prescribed and for the ascertainment of guilt. The statute involved here meets that standard. The notice given by the Penal Code is abundantly clear: Do not commit murder in the first degree because if you do you may find yourself subject to death or lifetime behind bars if the killing is accompanied by one or more of the special circumstances set forth in Penal Code § 190.2. What is forbidden is murder. Once a person decides to engage in that clearly defined activity it is difficult to believe that he or she has any real need, much less constitutional right to the same sort of precision with respect to the nature of the special circumstances that will elevate that murder to one that can be so punished. Once a person decides to murder another his choice of methods is not within the ambit of protected activity." (App. A, at 12.)

Justice Poche emphasized that if the due process clause required the same specificity in defining special circumstances as it does in the definition of crime itself, that the

"especially heinous, atrocious, or cruel" special circumstance satisfied such demand for specificity. Justice Poche, in full accord with the Supreme Court of Florida's decision in *State v. Dixon, supra*, concluded that the phrase "a conscienceless or pitiless crime which is unnecessarily torturous to the victim" is self-explanatory, having no different meaning in law than it had in ordinary language. Finally, Justice Poche stressed that the special circumstance under challenge "cannot be made more clear by any other judge-blessed words in the English language except by an all-inclusive listing of specific examples." (App. A, at 3.) Not only has this Court not suggested that a specific listing of particular acts is necessary, but the decision of *Proffitt v. Florida, supra*, runs directly counter to such a suggestion.

In *Proffitt*, this Court concluded that the very death penalty standard under discussion in the instant case was not unconstitutionally vague. *Proffitt v. Florida, supra*, 428 U.S., at 255-256. The specific question of whether the "especially heinous, atrocious, or cruel" death penalty standard is vague under the due process clause, was considered and rejected in *Spinkellink v. Wainwright* (5th Cir. 1978) 578 F.2d 582, 610-612, *cert. den.* 440 U.S. 976, *reh. den* 441 U.S. 937.

Petitioner submits that the special circumstance the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity, [meaning] a conscienceless, or pitiless crime which is unnecessarily torturous to the victim" provides a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia, supra,*

428 U.S., at 188, quoting *Furman v. Georgia, supra,* 408 U.S., at 313 (White, J., concurring); *Godfrey v. Georgia,* ..... U.S. ..... (1980), 64 L.Ed.2d 398, 406.

Finally, we emphasize that any vagueness which could result from the application of the "especially heinous" special circumstance, will be obviated by the state Supreme Court construing the statute to keep it within constitutional bounds. There is no reason to believe that the California Supreme Court will adopt an open-ended construction of the "especially heinous, atrocious, or cruel" special circumstance such that every first-degree murder could be brought within its reach. *Gregg v. Georgia, supra,* 428 U.S., at 201.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: August 20, 1980

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(Appendices follow)

Appendices

Appendix A

In the Court of Appeal of the State of California
First Appellate District, Division Four

People of the State of California, Petitioner, vs. Superior Court, Santa Clara County, Respondent, Allen Leroy Engert, Real Party in Interest.	1 Civil No. 48470 (Sup. Ct. No. 72637)
People of the State of California, Petitioner, vs. Superior Court, Santa Clara County, Respondent, John W. Gamble, Real Party in Interest.	1 Civil No. 48390 (Sup. Ct. No. 73240)

[Filed May 1, 1980]

OPINION

The People seek a determination that respondent court erred when, in two pending murder cases, it struck out of both informations special circumstance allegations which had been pleaded in order to subject the defendants to the death penalty or life imprisonment without possibility of parole.

CERTIFIED FOR PUBLICATION
SEE DISSENTING OPINION

The trial court held to be unconstitutionally vague the provision authorizing a death penalty or life without possibility of parole where "The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily tortuous to the victim." (Pen. Code, § 190.2, subd. (a)(14).)

In the trial of a capital case a jury first decides whether the defendant is guilty of murder in the first degree. If the verdict is first degree murder the jury determines whether the offense was attended by one of several special circumstances specified by statute. (Pen. Code, § 190.2.) Some of these special circumstances are quite definite in nature. For example, a special circumstance would exist if the victim was a prosecutor killed in retaliation for performance of his official duties. (Pen. Code, § 190.2., subd. (a)(11).) If a charged special circumstance is found to be true, a penalty of death or life without possibility of parole is mandatory. Subsequently an evidentiary hearing is conducted to enable the jury to consider matters bearing on aggravation and mitigation. The choice of penalty, however, has already been restricted to two possibilities. The effect of mitigating circumstances is limited because mitigating factors are considered only after the jury has narrowed its options by finding the existence of a special circumstance. The judge may reject a jury-imposed death penalty only if he finds that it is "contrary to law or the evidence presented." (Pen. Code, § 190.4., subd. (e).)

A penal statute violates due process requirements if it is so vague that a person of common intelligence must speculate as to its meaning. (Lanzetta v. New Jersey (1939) 306 U.S. 451, 453.) When a statute is attacked for vagueness and uncertainty under the due process clause, there are two facets to the examination. "A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed [notice] as well as a standard for the ascertainment of guilt by the courts called upon to apply it [guidance]." (People v. McCaughan (1957) 49 Cal.2d 409, 414.) The language of section 190.2, subdivision (a)(14), does not provide adequate guidance to juries.

The jury must decide on life or death on the basis of a list of epithets which do not by their multiplication more precisely define conduct. As in the attempt to define "lewd or dissolute," the addition of "perjorative adjectives" only heightens the uncertainty. The Supreme Court in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 249, explained:

> "This impressive list of adjectives and phrases confers no clarity upon the terms "lewd" and "dissolute" in section 647, subdivision (a). Indeed, "the very phrases and synonyms through which meaning is purportedly ascribed serve to obscure rather than to clarify those terms." (*State v. Kueny* (Iowa 1974) 215 N.W.2d 215, 217 (holding the phrase "open and gross lewdness" unconstitutionally vague).) To instruct the jury that a "lewd or dissolute" act is one which is morally "loose," or "lawless," or "foul" piles additional uncertainty upon the already vague words of the statute. *In short, vague statutory language is not rendered more precise by defining it in terms of syno-*

nyms of equal or greater uncertainty." (Emphasis added.)

Here, the words "cruel," "atrocious" and "heinous" are explained by the use of terms of even more uncertainty, i.e., "conscienceless" and "pitiless." Nor does the use of the word "especially" aid in clarification; it adds another area of uncertainty by requiring a jury to assess the level of cruelty in the "ordinary" first degree murder.

The provision also contains the puzzling term "unnecessarily torturous," which the Attorney General interprets as meaning "the infliction of additional pain beyond that required to kill the victim"—apparently placing on the jury the task of determining what amount of pain it would have "required" to kill the victim. Section 190.2 contains another special circumstance which provides for the additional penalty when "[t]he murder was intentional and involved the infliction of torture." (Pen. Code, § 190.2, subd. (a)(18).) If the jury is instructed that torture means the same thing for both special circumstances, the jury must look to a "thesaurus" of "perjorative adjectives" (Pryor, *supra,* 25 Cal.3d at p. 248) to distinguish between the two special circumstances. No commonly understood meaning attaches to the term "unnecessarily torturous" as distinguished from "the infliction of torture." If the jury is unable to find "torture" within the meaning of subdivision (a)(18), then subdivision (a)(14) is an invitation to the jury to register a general feeling of revulsion toward a particular homicide defendant by finding the truth of that special circumstance. The section's vague language permits capricious and arbitrary application by a jury.

In holding unconstitutionally vague a special circumstance which allowed for the death penalty where a " '. . . murder [is] committed by a person . . . who has a substantial history of serious assaultive criminal convictions,' " the Georgia Supreme Court stated: "Whenever a statute leaves too much room for personal whim and subjective decisionmaking without a readily ascertainable standard or minimal, objective guidelines for its application, it cannot withstand constitutional scrutiny. [Citations.] This doctrine has particular application to death penalty statutes after *Furman* v. *Georgia* [(1972) 408 U.S. 238], where, if anything is made clear, it is that a wide latitude of discretion in a jury as to whether or not to impose the death penalty is unconstitutional." (Arnold v. State (1976) 224 S.E.2d 386, 391-392.)

The People argue that a similar provision in the Florida death penalty statutes was upheld by the United States Supreme Court in *Proffitt* v. *Florida* (1976) 428 U.S. 242. In the Florida capital-sentencing system, the jury could consider as aggravated a murder that was " 'especially heinous, atrocious, or cruel' " and the Supreme Court of Florida has construed the statutory process as directed only at " 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' " (Proffitt v. Florida, *supra,* at p. 255, quoting from State v. Dixon (1973) 283 So.2d 1, 9.) The United States Supreme Court stated: "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See Gregg v. Georgia, ante, at 200-203[]." (*Id.*, at pp. 255-256.)

In Proffitt, however, the Supreme Court specifically noted: "As in Gregg, we examine the claims of vagueness and overbreadth in the statutory criteria only insofar as it is necessary to determine whether there is a substantial risk that the Florida capital-sentencing system, when viewed in its entirety, will result in the capricious or arbitrary imposition of the death penalty. See Gregg v. Georgia, ante, at 201 n. 51, []." (*Id.*, at p. 254, fn. 11.) In *Gregg,* the court was considering the definition of murder as "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" when it noted that: "In light of the limited grant of certiorari . . . [w]e review the 'vagueness' and 'overbreadth' of the statutory aggravating circumstances only to consider whether their imprecision renders this capital-sentencing system invalid under the Eighth and Fourteenth Amendments because it is incapable of imposing capital punishment other than by arbitrariness or caprice." (Gregg v. Georgia (1976) 428 U.S. 153, 201, fn. 51.) Thus the broader question whether the statutory language is too vague to comport with due process was expressly left open.

In *Furman v. Georgia, supra,* 408 U.S. 238, the Supreme Court had held unconstitutional the death penalty provisions before it on the ground that they constituted " 'cruel and unusual' " punishments under the Eighth Amendment, applicable to the states under the Fourteenth Amendment. (*Id.*, at p. 257.) The death penalties were considered cruel and unusual by the *Furman* court because the discretion conferred was "standardless." The problem was not remedied by the mandatory statutes but "simply papered over."

(Woodson v. North Carolina (1976) 428 U.S. 280, 302. The court was still limiting its consideration to the Eighth Amendment argument. The question under consideration in the instant petition is whether the specific provision is so vague and uncertain that a conviction under its standard would constitute a denial of due process.

Not only does the issue before us raise a different constitutional question from that addressed in *Proffitt,* the provision under consideration here occupies a significantly different place in California's statutory scheme than it does in Florida's. In Florida, it is one of eight aggravating circumstances. The jury is not required to make a finding on the "especially heinous" factor: it is but one factor it is directed to consider. When the heinousness of a murder is one of several factor to be considered, there is less likelihood that the vagueness of the standard will affect the discretion of the finder of fact. In Florida, the jury is not required to choose the penalty in accordance with its finding that the crime was especially heinous. If a defendant is found guilty of a capital offense, an evidentiary hearing is held, after which the jury considers whether some of the seven statutory mitigating circumstances in combination outweigh the aggravating circumstances found to exist. The sentencing choice is between death and life imprisonment, which includes the possibility of parole. The jury's decision is only advisory; the actual sentence is determined by the trial judge, (See Proffitt v. Florida, *supra,* 428 U.S. at pp. 248-249.)

In upholding the aggravating circumstance, the Florida Supreme Court, in a case cited in *Proffitt* noted the dangers of letting vague language be the guide for a jury, but

upheld the "especially heinous" language because it felt that an experienced judge would be able to give the language some consistency of application. "To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard [of] criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in light of judicial experience." (State v. Dixon, *supra,* 283 So.2d at p. 8.) Georgia's statutory scheme is similar to Florida's; the basic difference is that the jury rather than the trial judge determines the sentence. In California, however, once the jury finds the crime "especially heinous," it must fix the penalty as directed. It must come to grips with the language of the provision because it must make a finding on all charged special circumstances.

Considering the differing contexts in which the provision is found and the different issues before the courts, we conclude that the holding in *Proffitt* is of limited effect in considering the issue whether the "especially heinous" language in Penal Code section 190.2, subdivision (a)(14), is void for vagueness under the due process clause.

The holding in *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Here, that concern is extended to prohibit arbitrary and capricious imposition of either the death penalty or life in prison without the possibility of parole. The focus is not so much on the type of penalty imposed as it is on

the manner in which it is imposed. In *Proffitt* the court held that Florida's similar statutory language provided adequate guidance to the jury during sentencing. However, the court viewed the language in the context of Florida's statutory scheme: as a sentencing factor, to be weighed against other factors in determining a sentence. In California this same language is not a sentencing factor; it is a special circumstance which, if found true, narrows the sentencing choices to two—death or life without possibility of parole. In this context the vague language cannot withstand constitutional scrutiny.

It is concluded that the court acted properly when it struck the special circumstances specified in section 190.2, subdivision (a)(14).

The alternative writs are discharged and the petitions are denied.

Certified for publication.

Christian, J.

I concur:

Rattigan, Acting P. J.

People v. Superior Court (Engert & Gamble)

1 Civil 48470, 48390

I respectfully dissent.

Although I am impressed by the scholarship of my majority brethren in attempting to reconcile the United States Supreme Court opinions they cite, particularly *Furman* and *Gregg*, I am not convinced that subdivision 14 of Penal Code section 190.2(a) is vague, much less that it is unconstitutionally vague. That provision, which is part of an initiative measure approved by the voters in 1978, carries a strong presumption of constitutionality. It must be upheld unless its unconstitutionality "clearly, positively and unmistakably appears." (In re Dennis M. (1969) 70 Cal.2d 444, 453.)

The United States Supreme Court cases cited by the majority do not even touch on the due process attack that is involved here. Perhaps realizing this infirmity, the majority instead place considerable emphasis on the California Supreme Court's decision in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238. That reliance is puzzling. There it was held that "vague statutory language, resulting in inadequate notice of the reach and limits of the statutory proscription, poses a specially serious problem when the statute concerns speech, for uncertainty concerning its scope may then chill the exercise of protected First Amendment rights." (Id. at p. 251.) The court noted that a list of adjectives uncovered in case annotations to an *obscenity* statute did not render a vague *vagrancy* statute more precise. Such First Amendment concerns are not apposite to murder.

Due process commands that a penal statute must be definite enough to provide both a standard of conduct for those whose activities are proscribed and for the ascertainment of guilt. The statute involved here meets that standard. The notice given by the Penal Code is abundantly clear: do not commit murder in the first degree because if you do you may find yourself subject to death or lifetime behind bars if the killing is accompanied by one or more of the special circumstances set forth in Penal Code section 190.2. What is being forbidden is murder. Once a person decides to enage in that clearly defined activity it is difficult to believe that he or she has any real need, much less constitutional right, to the same sort of precision with respect to the nature of the "special circumstances" that will elevate that murder to one that can be so punished. Once a person decides to murder another his choice of methods is not within the ambit of protected activity. If the statutory description of the special circumstance is less than photo precise, it does not chill that murderer in the exercise of his First Amendment rights. Quite to the contrary, that alleged lack of specificity may serve a very real social good in helping to dissuade the potential killer from either committing the crime or committing it in a way that could be characterized as heinous, atrocious or cruel, manifesting exceptional depravity.

But even if the due process clause requires the same specificity in defining special circumstances as it requires in the definition of the crime itself, that demand has been met. Is there any doubt that a juror or a potential murderer can determine what is meant by "a conscienceless or pitiless crime which is unnecessarily torturous to the vic-

tim"? These terms define themselves. They have no different meaning in law than they have when used in ordinary conversation. The idea intended to be expressed by these words cannot be made more clear by any other judge-blessed words in the English language, except by an all inclusive listing of specific examples.

If such an enumeration is constitutionally required the majority opinion should say so because the Penal Code will require redrafting when this decision becomes final. Instead of the few lines of Penal Code section 190.2(a)(14)

> (i.e., "The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim")

we will have a new Penal Code section 190.2(a)(14). Doubtless it will resemble a compendium of methods gleaned from the activities of the Marquis de Sade. Then the person who is thinking of murdering can read through the descriptive listing. Murder by beheading might be mentioned and if it is, supposedly he could decline to carry out his crime in that manner. But if the drafters in a careless moment fail to mention murder by acid bathing then the potential murder would not put himself or herself in jeopardy of either death or lifetime imprisonment if such a method is chosen. If this person then carries out this perversion there is no way under the majority holding that such a person could be put permanently beyond society.

There is some language in the majority opinion that can be read as admitting that the statutory definitions here provide an adequate standard of conduct to the person contemplating crime. That same language, however, indicates that the statute is too vague to provide an adequate standard for the ascertainment of guilt by a jury. If that is what my colleagues mean I find it astonishing: the holding is that the statute provides each juror with a constitutionally precise enough standard by which to guide his conduct (in the event he is contemplating murder by torture) but does not provide that same person with enough in the way of definition to judge the conduct of another person. Apparently the criminals have been provided a non-vague standard but the finders of fact have not been, even though it is the same statute that is vague to one and precise to the other. Penal Code section 190.2, subdivision (a)(14) is, if I understand the majority analysis, a two-way mirror, unlike the looking glass in Alice in Wonderland. When the criminal looks at it he sees the precise definition of a crime but when the non-criminal, the juror, glances at the mirror it is terribly vague, maybe even constitutionally opaque.

It is true, as my colleagues point out, that another special circumstance not under review here (a)(18) requires only an intentional murder involving the "infliction of torture" whereas under (a)(14) what is necessary in the murder is a "pitiless crime which is *unnecessarily* tortuous to the victim." My colleagues suggest that a jury unable to find torture under (a)(18) will be invited by the higher standard of (a)(14) to be "capricious and arbitrary" and to register a general feeling of revulsion toward a particular homicide defendant. That is the equivalent of contending

that a jury unable to find evidence of a lesser included offense will be "invited" by the very existence of the principal crime to vent their prejudice on a defendant so charged.

Each of these cases arises solely from the pleadings—an information and a "demurrer/motion to strike." Neither this court nor the trial court knows the details or even the outlines of the alleged killings. For all we know the defendants were each engaged in the most heinous activity that can be imagined by the demented. When the various trials are completed there is considerable review available ranging from motions for a new trial through automatic, nonwaivable appeal. I have no doubt that the rights of each defendant will be properly protected by such review. If the fear of the majority here is of a runaway jury, that fear should be calmed by knowledge of the innumerable procedural protections available to a defendant in a "special circumstances" case.

Because I harbor reasonable doubt that the unconstitutionality of Penal Code section 190.2(a)(14) "clearly, positively and unmistakably appears," I would set aside the orders striking the special circumstances alleged in each of the informations.

Poché, J.

Appendix B

Court of Appeal of the State of California
In and for the
First Appellate District

Division Four

People of the State of California, Petitioner, vs. Superior Court, Santa Clara County, Respondent, Allen LeRoy Engert, Real Party in Interest.	No. 48470 Santa Clara Superior Court No. 72637
People of the State of California, Petitioner, vs. Superior Court, Santa Clara County, Respondent, John W. Gamble, Real Party in Interest.	No. 48390 Santa Clara Superior Court No. 73240

[Filed May 29, 1980]

By the Court:

The petition for rehearing is denied.

(Poche, J. is of the opinion that petition should be granted.)

Dated May 29, 1980

Rattigan, J., Acting P. J.

Appendix C

Order Due
June 30, 1980

Order Denying Hearing
After Judgment by the Court of Appeal

1st District, Division 4,

Civil No. 48470
Civil No. 48390

In the Supreme Court of the State of California
In Bank

People, Petitioner

v.

The Superior Court of Santa Clara County, Respondent;
Engert, Real Party In Interest

People, Petitioner

v.

The Superior Court of Santa Clara, County, Respondent;
Gamble, Real Party In Interest

[Filed June 25, 1980]

Petition for hearing denied.

Clark, J., and Richardson, J., are of the opinion that the petition should be granted.

/s/ BIRD

Chief Justice

I, Laurence P. Gill, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 28th day of July, 1980.

By /s/R. C. MATTEOLI

Deputy Clerk

[Seal]

Appendix D

Court of Appeal of the State of California
In and for the
First Appellate District

Division Four

People of the State of California, Petitioner, vs. Superior Court, County of Santa Clara, Respondent. Allen Leroy Engert, Real Party in Interest.	No. 48470 Superior Court No. 72637
People of the State of California, Petitioner, vs. Superior Court, County of Santa Clara, Respondent. John W. Gamble, Real Party in Interest.	No. 48390 Superior Court No. 73240

[Filed June 30, 1980]

By the Court:

The petition by the Attorney General of the State of California for stay of issuance of remittitur and for an order staying the execution and enforcement of the judgment in the above entitled cause to permit the filing of a petition for writ of certiorari in the United States Supreme

Court is granted. It is therefore ordered that the issuance of the remittitur and the execution and enforcement of the judgment be and is hereby stayed until the time for filing such petition has expired, or until the further order of this court. If such a petition for writ of certiorari is timely filed, the issuance of the remittitur and the execution and enforcement of the judgment shall be stayed until the decision thereon by the United States Supreme Court has become final.

Date June 30, 1980

/s/ Rattigan, Acting P.J.

Supreme Court, U. S.
FILED
OCT 29 1980
MICHAEL RODAK, JR., CLERK

No. 80-274

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA,
Respondent,
ALLEN LEROY ENGERT and JOHN WAYNE GAMBLE,
Real Parties in Interest.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

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No. 80-274

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA,
Respondent,
ALLEN LEROY ENGERT and JOHN WAYNE GAMBLE,
Real Parties in Interest.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

ARGUMENT

I

THE COURT HAS JURISDICTION UNDER 28 US.C. § 1257(3)

A. The Court of Appeal relied upon federal authorities and state cases which rely upon federal authorities

Real Parties in Interest, (hereinafter defendants) in their Opposition to the Petition for Writ of Certiorari, contend that jurisdiction does not lie under 28 U.S.C. section 1257(3) because the trial court's decision declaring California Penal Code section 190.2, subdivision (a)(14) to

be void for vagueness was explicitly based on the due process clause of both the State and Federal Constitutions. Although defendants are correct in stating the trial court's ruling was premised on both the State and Federal Constitutions, it is *not* the trial court's ruling which is subject to review in this Court. Rather it is the decision of the First Appellate District Court of Appeal of the State of California, Division Four, which is reviewable pursuant to 28 U.S.C. section 1257(3).

The State Court of Appeal, in its decision clearly relied upon the due process clause of the Federal Constitution to strike down the especially heinous, atrocious, or cruel "special circumstance" of California Penal Code section 190.2(a)(14). The Court of Appeal set out the guiding principles of due process as follows:

> "A penal statute violates due process requirements if it is so vague that a person of common intelligence must speculate as to its meaning. (*Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.) When a statute is attacked for vagueness and uncertainty under the due process clause, there are two facets to the examination. 'A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed [notice] as well as a standard for the ascertainment of guilt by the courts called upon to apply it [guidance].' (*People v. McCaughan* (1957) 49 Cal.2d 409, 414.) The language of section 190.2, subdivision (a)(14), does not provide adequate guidance to juries." (Petition for Writ of Certiorari, A-3.)

Although the Court of Appeal cited *People v. McCaughan,* 49 Cal.2d 409 (1957) in addition to the landmark *Lanzetta* decision of this Court, the authorities on which *McCaughan* relied utilized the federal rule. The principal citation in *McCaughan* is *Winters v. New York,* 333

U.S. 507, 515-516 (1948). The *Winters* case is followed by California cases; however, these cases also follow the federal due process standard for avoidance of vagueness in criminal prosecution. See *In re Peppers*, 189 Cal. 682, 686 (1922); *People v. Building Maintenance Contractors' Assn., et al.*, 41 Cal.2d 719, 725 (1953); *People v. Saad*, 105 Cal. App.Supp.2d 851, 854 (1951). Since the Court of Appeal in the instant case relied solely on the standards of due process expressed in federal cases and California cases which solely rely on federal cases, without citing or otherwise referring to the California Constitution, the Court of Appeal decision is grounded solely on the federal due process clause. Moreover, the fact that the Court of Appeal found it necessary to attempt to distinguish *Proffitt v. Florida*, 428 U.S. 242 (1976), reveals the federal basis. Cf. *Oregon v. Hass*, 420 U.S. 714, 719-720 (1975).

B. Article I, section 27 of the California Constitution establishes that the validity of the challenged special circumstance may be decided only by reference to the Federal Constitution

In the Opposition defendants contend that Article I, section 27 of the California Constitution (quoted in the Petition for Writ of Certiorari at p. 10) does not limit review of the California death penalty law only to the Federal Constitution. (Opposition, at p. 2.) In answer we direct the Court to the "Detailed Analysis by the Legislative Counsel" submitted to the voters in the November 7, 1972 General Election.

> "Adoption of [Article I section 27] would specifically prevent the provisions in Section 6 of Article I, or any other provision, of the California Constitution from being held to prohibit the death penalty. [¶] If this measure is adopted, every statutory law of California relating to the death penalty that was rendered in-

> effective by the decision of the California Supreme Court would be reinstated (subject to amendment or repeal) insofar as their validity under the California Constitution is concerned. Their validity under the United States Constitution, however, is a separate issue. [¶] The United States Supreme Court has held that the United States Constitution bars imposition of the death penalty in certain criminal cases under statutes giving uncontrolled discretion to judges or juries to determine whether or not to impose the death penalty. The United States Supreme Court, however, did not hold that the United States Constitution precludes the imposition of the death penalty in all cases. *This measure would, therefore, make effective the statutes of this state relating to the death penalty to the extent permitted under the United States Constitution.*" (Ballot Pamp., Proposed Amends. to Cal.Const. with arguments to voters, Gen.Elec. (Nov. 7, 1972), emphasis added.)

The California Supreme Court has held that ballot arguments and analysis presented to voters may be helpful in determining the probable meaning of constitutional amendments adopted by the initiative process. *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208, 245-246 (1978). As we pointed out in the Petition for Writ of Certiorari, the California Supreme Court in *People v. Frierson*, 25 Cal.3d 142 (1979) recognized that the purpose of Article I, section 27 was to conform "California Law to the demands of the federal Constitution, as expressed by the high court in *Furman* and *Gregg v. Georgia, et al.*" *Id.*, at 185. *Furman* and *Gregg v. Georgia, et al.* reach not only the constitutionality of the death penalty as a punishment, but, equally important, establish the minimum federal constitutional

due process requirements for determining whether the death penalty is appropriate in a particular case.

Although, as defendants point out (Opposition, at p. 2), the portion of the *Frierson* opinion cited in the petition was a plurality opinion, still the view of the majority of the justices was that the validity of the California death penalty procedures was ultimately a federal question. Justice Mosk, in a separate opinion, concurring in the judgment expressed in the lead opinion written by Justice Richardson and joined by Justices Clark and Manuel, indicated his view that Article I, section 27 insulated the California Death Penalty statutes from review under the state constitution. Justice Mosk said:

> "I am therefore compelled to conclude that the 1977 death penalty legislation does not violate the California Constitution. Whether it complies with the federal Constitution is a different question that is much more difficult to answer. The difficulty, of course, is that the United States Supreme Court has both created the problem of such compliance and failed to give the states consistent and workable guidance on how to solve it." See *People v. Frierson, supra,* 25 Cal.3d at 189-190 (concurring opinion of Mosk, J., joined by Newman, J.)

Therefore the majority view of the California Supreme Court was that the validity of California's death penalty is a federal question. Indeed, this Court in *Gregg v. Georgia, supra,* stated that each distinct death penalty sentencing system must be examined on an individual basis. *Gregg v. Georgia, supra,* 428 U.S. at 195.

II

THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" SPECIAL CIRCUMSTANCE, TAKEN IN THE CONTEXT OF ITS USE IN THE CALIFORNIA DEATH PENALTY STATUTORY SCHEME SATISFIES FEDERAL DUE PROCESS REQUIRMENTS

A. Proffitt v. Florida cannot be distinguished

Defendants brush aside *Proffitt v. Florida, supra,* urging this court limited review in *Proffitt* to the question whether the Florida capital-sentencing scheme, viewed in its entirety, will result in the capricious or arbitrary imposition of the death penalty (citing *Proffitt v. Florida, supra,* 428 U.S. at 254, fn. 11; *Gregg v. Georgia, supra,* 428 U.S. at 201, fn. 51). (Opposition, pp. 3-4.) In answer, we urge that the due process argument was rejected by this Court in *Proffitt.* Proffitt had asserted that the Florida aggravating and mitigating circumstances were so vague and broad that virtually " 'any capital defendant becomes a candidate for the death penalty. . . .' " *Id.,* at 255. Under challenge was the aggravating circumstance which authorized the death penalty for crimes "especially heinous, atrocious, or cruel." Noting that the Florida Supreme Court had determined the "especially heinous, atrocious, or cruel" aggravating circumstance was directed only at " 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim' ", this Court advised that it could not say the aggravating circumstance provided inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. *Id.,* at 255-256. If the "especially heinous, atrocious, or cruel" aggravating circumstance provides adequate guidance to capital sentences in Florida, the same should hold true for California. *Proffitt* establishes that the language "especially heinous, atrocious, or cruel" is not unconstitutionally vague resulting in the capricious or arbitrary infliction of the death penalty.

As noted in the Petition for Writ of Certiorari (p. 20) the specific issue of whether the challenged language is vague under the due process clause, was rejected in *Spinkellink v. Wainwright*, 578 F.2d 582, 610-612 (5th Cir. 1978), *cert. den.* 440 U.S. 976, *reh. den.* 441 U.S. 937. This Court denied Spinkellink a stay of execution of his death sentence. *Spinkellink v. Wainwright, et al.*, 442 U.S. 1301 (1979).

B. The "especially heinous, atrocious, or cruel" special circumstance is not duplicative of the murder by torture special circumstance

Defendants argue that the "especially heinous, atrocious or cruel" special circumstance is duplicative of the murder by torture special circumstance, which defendants concede contains definite language. (Opposition at p. 5.) California Penal Code section 190.4, subdivision (a) provides in relevant part:

> "Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime."

Murder by torture is one means of committing murder which elevates the crime to first degree. Cal.Pen.Code § 189. Murder by torture is distinguished in California from murder less severely punished by the *means* in which it is carried out. *People v. Wiley*, 18 Cal.3d 162, 167-169 (1976). For example, in *Wiley* the victim was beaten first on the head with fists, then he was beaten on all parts of his body with a baseball bat, followed by a hammer. The California Supreme Court determined that this evidence was sufficient to have permitted the trier of fact to have concluded the defendant intended the victim to suffer. *Id.*, at 167-168.

We urge that a murder may be "especially heinous, atrocious, or cruel" without establishing murder by torture, either as a basis for reaching first degree murder by torture, or invoking a penalty phase of the trial via the murder by torture special circumstances. Compare *Spinkellink v. Wainwright, supra,* 578 F.2d 586, wherein defendant shot his sleeping victim once in the head and then in the back. Spinkellink's crime would not have amounted to murder by torture but Spinkellink was executed for a crime which was found to be especially heinous, atrocious, or cruel.

C. Special circumstances in California are sentencing standards, not elements of capital murder

Defendants contend that special circumstances in California are elements of capital murder, so that they must have the same degree of definition and certainty as elements of a crime. This interpretation is erroneous.

In *People v. Green*, 27 Cal.3d 1 (1980), the California Supreme Court analyzed the 1977 death penalty law enacted by the Legislature and, although this was replaced by the electorate with a new death penalty law which altered and increased the special circumstances for which the death penalty could be imposed,[1] the Court's discussion of "special circumstances" applies to the new law. The *Green* court recognized that the thrust of *Furman*[2] was that absolute discretion vested in the jury to determine life or death in capital cases constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments because death sentences were arbitrarily im-

---

[1]Section 5 of the Initiative Measure passed by the electorate in the November 7, 1978 general election.

[2]*Furman v. Georgia*, 408 U.S. 238 (1972).

posed in that: " 'there [was] no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.' " *Id.*, at 48; quoting *Furman*, 408 U.S. at 313. The *Green* court next noted that this Court in *Gregg v. Georgia, et al.*, adopted as a solution to absolute jury discretion the requirement that jury discretion in capital cases " 'be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' " *Id.*, at 48; quoting *Gregg*, 428 U.S. at 189. Further, "guidance must be provided by *objective sentencing standards* designed to compel the jury to 'focus on the particularized circumstances of the crime and the defendant.' " *Id.*, at 48; quoting *Gregg*, 428 U.S. at 199. (Emphasis added.) The *Green* court next stated that the intent in adding special circumstances to the California death penalty law was "manifestly to provide sentencing standards in capital cases *adequately specific* to satisfy the requirements of the *Federal Constitution* enunciated by *Furman* and *Gregg, et al.*" *People v. Green, supra,* 27 Cal.3d at 49. In short, the California Supreme Court has left no doubt that special circumstances are sentencing standards, not elements of crime. We remind the Court that the "especially heinous, atrocious, or cruel" death penalty sentencing standard has already been upheld as adequately specific to satisfy due process in *Spinkellink v. Wainwright, supra*, 578 F.2d 582, *cert. den.* 440 U.S. 976, *reh. den.* 441 U.S. 937, and with ultimate finality by this Court in *Spinkellink v. Wainwright, et al.*, 442 U.S. 1301 (1979).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Dated: October 23, 1980.

Respectfully submitted,

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No. 80-274

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Petitioner,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SANTA CLARA,
Respondent,

ALLEN LEROY ENGERT and JOHN WAYNE GAMBLE
Real Parties in Interest.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

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MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46, paragraph one of the Rules of this Court, motion is hereby made that the real parties in interest be allowed to proceed in forma pauperis before this Court, for the reasons stated in the attached affidavit. Leave of the Court is requested to file the attached typewritten Opposition to Petition for Writ of Certiorari pursuant to Rule 39.

SHELDON PORTMAN, Public Defender
County of Santa Clara

Attorney for Real Parties in
Interest Engert and Gamble

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AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

I, Allen Leroy Engert, under penalty of perjury, depose and say:

(1) I am a real party in interest in the above-entitled case;

(2) Because of my poverty I am unable to pay the costs of said cause, or the cost of printing the attached Opposition to Petition for Writ of Certiorari;

(3) I am unable to give security for any costs;

(4) I have been incarcerated continuously since May, 1979.

Executed this 3 day of October, 1980, at San Jose, California.

Allen L. Engert
ALLEN LEROY ENGERT

Sworn to and subscribed before
me this 3 day of October, 1980.

Rosemary Seiter Morrison
ROSEMARY SEITER MORRISON
Deputy Public Defender
(See Cal. Gov. Code §24057)

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Real Parties in Interest.

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

I, John Wayne Gamble, under penalty of perjury, depose and say:

(1) I am a real party in interest in the above-entitled case;

(2) Because of my poverty I am unable to pay the costs of said cause, or the cost of printing the attached Opposition to Petition for Writ of Certiorari;

(3) I am unable to give security for any costs;

(4) I have been incarcerated continuously since August, 1979.

Executed this 3 day of October, 1980, at San Jose, California.

John Gamble
JOHN WAYNE GAMBLE

Sworn to and subscribed before
me this 3 day of October, 1980.

Rosemary Sfiter Morrison
ROSEMARY SFITER MORRISON
Deputy Public Defender
(See Cal. Gov. Code §24057)

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Real Parties in Interest.

PROOF OF SERVICE

Affidavit of Sheldon Portman,
Member, Supreme Court Bar

I, Sheldon Portman, depose and say under penalty of perjury:

On October 3, 1980, true copies of the Motion for Leave to Proceed in Forma Pauperis, and Affidavits of John Wayne Gamble and Allen Leroy Engert in support of Motion for Leave to Proceed in Forma Pauperis, addressed to the Attorney General of the State of California, attention John Moy (counsel for petitioner) and to the Superior Court of Santa Clara County, attention Hon. Homer B. Thompson (respondent), have been deposited in a United States Post Office mail box at San Jose, California, as required by Rule 28, California Rules of Court.

Executed this 3rd day of October, 1980, at San Jose, California.

Sheldon Portman

SHELDON PORTMAN
Public Defender
Santa Clara County, California

Sworn to and subscribed
before me this 3rd day
of October, 1980.

Norwood A. Nedom

NORWOOD A. NEDOM
Deputy Public Defender
(See Cal. Gov. Code §24057.)

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to the Court of Appeal of the
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First Appellate District, Division Four

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Real Parties in Interest.

QUESTIONS PRESENTED

I.

Whether the decision below was based on an independent and adequate nonfederal ground.

II.

Whether the death penalty special circumstance of California Penal Code Section 190.2, subdivision (a)(14) - "[t]he murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity" is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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JURISDICTION

Real parties in interest submit that jurisdiction to review the instant decision does not exist under 28 U.S.C. section 1257(3) since the trial court's decision declaring California Penal Code §190.2(a)(14) to be void for vagueness was explicitly based on the due process clause of both the State and Federal Constitutions. (California Constitution, Article I, Section 7. See certified copy of the respondent trial court's order, attached as Appendix A.) That order was affirmed by the California Court of Appeal. There being an adequate and independent nonfederal ground for the instant decision, jurisdiction is lacking, and certiorari must be denied. (Wolfe v. North Carolina, 364 U.S. 177, 179, n.3.)

ARGUMENT:

I. THE COURT LACKS JURISDICTION UNDER U.S.C. §1257(3) BECAUSE THE DECISION VOIDING THE SPECIAL CIRCUMSTANCE IN QUESTION WAS PREMISED ON THE STATE CONSTITUTIONS DUE PROCESS CLAUSE, PROVIDING AN ADEQUATE AND INDEPENDENT STATE GROUND FOR THE DECISION.

The order of the trial court declaring the special circumstance void for vagueness explicitly relied on the due process guarantees of both the state and federal constitution. (See the certified copies of the orders, attached as Appendices A and B. A request for formal transmission by the clerk of the respondent court has been made.)

Petitioner has argued to this court that Article I, §27 of the California Constitution makes the reach of the state constitution coterminous with that of the federal constitution in regard to any death penalty statute, arguing at least impliedly that there is no independent state ground for the instant decision. Petitioner cites People v. Frierson (1979) 25 Cal.3d 142, 185 for that proposition. The argument fails for several reasons: (1) The Frierson opinion cited commanded only a plurality of the California Supreme Court, (2) Frierson did not decide the issue as to the possibility of independent state constitutional grounds with respect to matters other than the constitutionality of the punishment of death, and (3) Article I, §27, cited by the petitioner is limited by its terms to prevent "punishment for such offenses" from being deemed "to contravene any other provision of this constitution." The decision of the California Court of Appeal plainly did not deem the punishment of death to be unconstitutional under the due process clause, but merely struck one of nineteen "special circumstances"[1/] as being too vague to provide an ascertainable standard of guilt, especially

1/ See Cal. Penal Code §190.2(a)(1) through (19). The limited nature of the instant decision is further highlighted by the fact that one of the 14 special circumstances, concerning murder during the commission of specified felonies, contains nine further subsections upon which capital murder might be predicated (Cal. Penal Code §190.2(a)(17).

when read in conjunction with another similar special circumstance (Cal. Penal Code §190.2(a)(18)), which also provides capital liability for intention of murder that "involved the infliction of torture."

Petitioner is thus asking this court to construe the California Constitution in a way that would preclude the independent application of the state constitution's due process clause to the procedure by which the death penalty is administered, as opposed to the constitutionality of the punishment of death itself. The language of the constitutional provision cited by the petitioner (Article I, §27) does not support petitioner's argument, nor does the cited Frierson opinion (which in any event did not command a majority of the California Supreme Court.) The proposition that the United States Supreme Court does not (and cannot) authoritatively construe the constitutions of the various states is axiomatic. The existence of the independent and adequate state constitutional ground for the instant decision requires denial of certiorari. Wolfe v. North Carolina, supra.

II. THE "SPECIALLY HEINOUS, ATROCIOUS AND CRUEL" SPECIAL CIRCUMSTANCE, IN THE CONTEXT OF THE CALIFORNIA STATUTORY SCHEME, IS UNCONSTITUTIONALLY VAGUE UNDER THE FEDERAL DUE PROCESS CLAUSE.

A. There is No Conflict Between the Instant Decision and Proffitt.

Petitioner repeats his argument, rejected by the courts below, that Proffitt v. Florida (1976) 428 U.S. 242 decided that the language in question here was not void for vagueness under the Fourteenth Amendment's due process clause. Even a cursory examination of the Proffitt decision reveals the lack of merit of the argument. (See Proffitt, Id., at p. 254, fn. 11; Gregg v. Georgia (1976) 428 U.S. 153, 201 fn. 51.) Due to the limited

grant of certiorari in Gregg and Proffitt, the void for vagueness grounds of the instant case were expressly not reached. Petitioner thus has attempted to manufacture a conflict between the instant case and Proffitt, persistently and willfully ignoring the language of Proffitt itself as to what issue it was deciding. The California Court of Appeal quoted the relevant portions of Proffitt and Gregg and correctly held that "the broader question of whether the statutory language is too vague to comport with due process was expressly left open." (People v. Superior Court (Engert) (1980) 105 Cal.App.3d 364, 369-370.)

B. The "Specially Heinous, Atrocious and Cruel" Special Circumstance Presents Crippling Vagueness Problems in the California Death Penalty Scheme Since Another Special Circumstance Covers the Inflictions of Torture.

Even if the issue of the due process vagueness of the "heinous, atrocious and cruel" special circumstance (hereinafter referred to as HAC) had actually been decided by this Court in the context of the Florida death penalty statute, the different context of the California statutory scheme would require a contrary conclusion. The most unanswerable argument (and one never refuted or even mentioned by petitioner) as to the vagueness of the HAC special circumstance was clearly set forth by the California Court of Appeal in its opinion below: The California death penalty scheme already contains a special circumstance which provides for possible capital liability when "[t]he murder was intentional and involved the infliction of torture." (Cal. Penal Code §190.2, Subd. (a) (18). The task of limiting or construing the HAC special circumstance to give it an ascertainable meaning that would differentiate it from the"infliction of torture" special circumstance was deemed impossible by the Court of Appeal, and it is a problem

that has never been addressed by the petitioner, either in the litigation below or in the petition to this court. The Florida court's decision to limit the reach of the HAC language to the "unnecessarily torturous" made some sense in the context of a statutory scheme that did not otherwise cover the infliction of torture as an aggravating circumstance. (See Fla. Stat. Ann. §921.141(5) (Supp. 1976-77), as listed in Proffitt, supra, 428 U.S. at 248, n. 6.) To place the HAC language, with its "thesaurus of pejorative adjectives" (Engert, supra, 105 Cal.App.3d at 368) into a list of special circumstances which already contains the concededly definite language regarding the "infliction of torture" just as plainly makes no sense. It is confusing, duplicative and vague. The petitioner cannot claim that voiding the HAC special circumstance leaves torturous conduct outside the purview of capital murder while the "infliction of torture" special circumstance is on the books. No area of potentially capital murder has been removed from the purview of the statutory scheme by the decision of the court below. Instead, the California Court of Appeal recognized that if a jury is instructed that torture means the same thing for both special circumstances (and no other reasonable interpretation is apparent or has been offered by petitioner), then insuperable problems of differentiation, construction and application would arise. (Engert, 105 Cal.App.3d at 368-369.)

> If the jury is instructed that torture means the same thing for both special circumstances, the jury must look to a "thesaurus" of pejorative adjectives" (Pryor, supra, 25 Cal.3d at p. 248, [Pryor v. Municipal Court (1979) 25 Cal.3d 238, 249]) to distinguish between the two special circumstances. No commonly understood meaning attaches to the term "unnecessarily torturous" as distinguished from "the infliction of torture." If the jury is unable to find "torture" within the meaning of subdivision (a)(18), then subdivision (a)(14) is an invitation to the jury to register a general feeling of revulsion toward a particular homicide defendant by finding the truth of that special circumstance.

In sum, the petitioner has (at least in his briefs below) conceded a modicum of vagueness in the HAC language, but has insisted that by importing the limiting language imposed by the Florida Supreme Court in State v. Dixon (1973) 283 So.2d 1, 9, the language is sufficiently definite. Petitioner has ignored the fact that a specific torture special circumstance is present in the California death penalty scheme and has persistently refused to offer any rational differentiation between the two. The Court of Appeal has wisely voided the HAC, recognizing that if torture is not found under the "infliction of torture" special circumstance, that the laundry list of pejorative adjectives (heinous, atrocious, cruel, conscienceless, pitiless, manifesting exceptional depravity) would be an invitation to unbridled jury discretion. The petitioner never relates his insistence that the "HAC" is definite because it is limited to torture to the reality that the statute covers torture, in a simple, comprehensible section, without using the thesaurus of highly subjective terms used in HAC. When the language of HAC is placed in a statute that contains a special circumstance relating to infliction of torture, extreme problems of differentiation and harmonization arise. If the two sections cannot and are not differentiated in manner which is comprehensible to a jury, then the dangers of having a special circumstance finding on HAC that is not premised on the purported "unnecessarily torturous" limitation is increased, allowing a clear avenue for inconsistent and capricious application of the language.

If the jury is instructed that torture means the same thing for both special circumstances, then the jury must return to the pejorative adjectives in an attempt to give the clause some meaning vis a vis §190.2(a)(18). The only conceivable purpose in submitting the special circumstance would then be to invite

the jury to ignore the limiting instruction and return to the epithets. It is this danger that the Court of Appeal recognized in viewing HAC in the context of the rest of the California death penalty statute, and which justified and required the voiding of the HAC special circumstance.

C. The "Especially Heinous, Atrocious, and Cruel" Special Circumstance Does Not Provide an Ascertainable Standard of Guilt in its California Context as an Element of Capital Murder Upon Which the Jury Must Make a Factual Finding Beyond a Reasonable Doubt.

There is yet another vital contextual difference between the use of the HAC language in the California statute and the Florida statute. In the California statute, the HAC language is presented to the jury in the guilt phase of the trial and the jury is required to make a factual finding utilizing the beyond a reasonable doubt standard. Only after a jury's affirmative factual finding can a trial move into the penalty phase, with the possibility only of death or life imprisonment without parole. (Cal. Pen. Code §190.2 et. seq.) This is to be contrasted to the Florida scheme, in which a first degree murder must be proved. Then a penalty phase follows, at which a jury recommends either life imprisonment (with the possibility of parole) or death. The jury's verdict is advisory only, the actual sentence is determined by the trial judge who is free to reject the jury's advisory penalty verdict. (See Proffitt, supra, 428 U.S. at pp. 248-249.)

The issue then arises as to whether language that is suitable in guiding sentencing discretion is, ipso facto, sufficient to establish an ascertainable standard of guilt on a factual element that must be proved in California before a penalty phase is held. Petitioner again seeks to ignore the vastly different context in which the HAC language is used in California as compared to Florida.

Petitioner attempts this by posing the issue as to whether a "procedure which requires a jury to find a special circumstance beyond a reasonable doubt and by unanimous verdict before a death penalty determination hearing may be held[,] provides no less protection to an accused" than the Florida scheme. (Pet. for Cert. at 15.) While the relative merits of the California procedure of separating capital murders from non-capital is an interesting issue, it is not presented for review by the instant case. The fact is that California has chosen to define factual elements, proof of which leads into the penalty determination phase. Having chosen to require proof of certain facts in the guilt phase, there can be no doubt of the duty of the state under the due process clause to provide a statute sufficiently definite to provide an ascertainable standard of guilt.

The due process ban on vagueness in criminal statutes has two components, that of adequate notice to potential offenders and adequate guidance to those who will apply the statute.

> A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it. (People v. McCaughran (1957) 49 Cal.2d 409, 414, per Traynor, J.)

See also Giaccio v. Pennsylvania (1966) 382 U.S. 399, 402, 403, 404:

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide without legally fixed standards what is prohibited and what is not in each particular case.... Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens

> upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce....
>
> It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as "misconduct" or "reprehensible conduct." If used in a statute which imposed forfeitures, punishments, or judgments for costs, such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause.

It is thus beyond question that the due process clause "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement'." Smith v. Goguen (1974) U.S. 566, 572-573.

Petitioner essentially contends that the HAC language can be moved from the position of an aggravating circumstance to be considered at sentencing of a person convicted of a capital offense (as in the Florida death penalty statute reviewed in Proffitt) into the offense-defining, guilt-determining part of a criminal trial, with no vagueness problems arising. The argument appears to be the simple one: if you can use this "especially heinous, atrocious, or cruel..." language as a factor to guide sentencing discretion, then you can use it to define an element of a capital offense. Such an argument is simple but it ignores the vast difference between the due process requirement of clarity in offense-defining statutes, for purposes of providing both notice and an ascertainable standard of guilt, versus the open inquiry, now constitutionally mandated in capital cases by Lockett v. Ohio (1978) 438 U.S. 580, that occurs at the time of a capital sentencing. Petitioner's argument obliterates the difference between the long-standing

principal of definiteness in the definition of crime and the historical and now constitutionally required breadth of factors which come into play at sentencing. Petitioner seeks to accomplish this obliteration by citing the United States Supreme Court's limited Eighth Amendment approval in Proffitt, supra,[2/] of the "especially heinous, atrocious, and cruel..." language as an aggravating factor to be considered at sentencing and then leaping to the conclusion that the justification for upholding the Florida aggravating circumstance applies with equal force to the California statute.

Such an argument is analogous to contending that every aggravating circumstance for felony sentencing listed in California Rule of Court 421 could be made into a sufficiently definite criminal statute.

By this reasoning, the Attorney General might, at the next legislative session, ask for a new penal statute proscribing the possession of a "large quantity of contraband," in the language of Rule 421(a)(11). The notice and ascertainable standard of guilt violation created by the conversion of this valid sentencing factor into an offense-defining statute could not be justified by the argument that since the language is sufficient as a

[2/] In light of petitioner's continued misreading of Proffitt, the plurality opinion of Justice Stewart bears repeating: "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." 428 U.S. at 255-256 (emphasis added). The concurring opinion of Justices White, Burger and Rehnquist was similarly circumscribed: "although the statutory aggravation and mitigating circumstances are not susceptible of mechanical application, they are by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered." 428 U.S. at 260 (emphasis added). The plurality noted that due to the limited grant of certiorari the vagueness and overbreadth attack was considered only in the Eighth Amendment "arbitrary or capricious" sense (428 U.S. at 254, n. 11). Thus the U.S. Supreme Court did not consider, or rule upon, the due process void-for-vagueness issue raised by the use of the "especially heinous" language as an offense-defining statute.

sentencing factor, it is sufficiently definite as an offense-defining statute. And yet that is the premise of petitioner's misplaced reliance on Proffitt v. Florida.

The very distinction missed by petitioner was made recently by Presiding Justice Kaus of the Second District Court of Appeals in People v. Thomas (1979) 87 Cal.3d 1014, 1023:

> Nor are we persuaded that the "circumstances in aggravation" enumerated in Rule 421 must fall because they have not been drafted with the narrowness and precision we require in statutes defining criminal offenses.

In contrast to the insistent demand of the Due Process Clause for narrowness and clarity in statutes which proscribe conduct and establish a standard of guilt is the preception that Due Process should not inhibit, and in capital cases requires, the broadest type of inquiry during the discretionary penalty determination. This concept of latitude in sentencing as distinguished from the guilt-determination, was detailed in Williams v. New York (1949) 337 U.S. 241, 246-247:

> In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused.... A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.

More recently, the U.S. Supreme Court in Lockett v. Ohio, supra, 438 U.S. at 602, recognized the continuing vitality and validity of Williams v. New York:

> We begin by recognizing that the concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country. See Williams v. New York, 337 U.S. at 247-248, 93 L.Ed. 1337, 69 S.Ct. 1079; Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. at 55, 82 L.Ed. 43, 58 S.Ct. 59. Consistent with that concept, sentencing judges traditionally have taken a wide range of factors into account.

Due to the wide range of factors taken into account at time of

sentencing, relating both to the offender and the offense, precise definition of each factor is less necessary than when the law is framing a standard of guilt. As Lockett held, too much precision in defining mitigating factors is itself a Due Process violation in capital cases, in that it "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, supra, 438 U.S. at 605.

It is an undeniable fact that the California death penalty scheme takes the HAC language from its sentence discretion-guiding function (as used in Florida) and attempts to use it as a factual element of a charge of capital murder, requiring the fact-finder to find its truth or falsity. Thus, Proffitt, not on point on the due process vagueness issue (for the reasons outlined in Section A, supra), is not even helpful to petitioner by way of analogy, given the recognized distinction that what is tolerable (or even desirable) vagueness in a sentence guiding factor may well violate the due process clause if used in a statute defining factual elements of a criminal offense.

CONCLUSION:

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

DATED: Oct. 3, 1983

SHELDON PORTMAN
Public Defender
Santa Clara County

MICHAEL A. KRESSER
Deputy Public Defender

No. 80-274

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

FOR THE COUNTY OF SANTA CLARA,

Respondent,

ALLEN LEROY ENGERT and JOHN WAYNE GAMBLE,

Real Parties in Interest.

PROOF OF SERVICE

Affidavit of Sheldon Portman,
Member, Supreme Court Bar

I, Sheldon Portman, depose and say under penalty of perjury:

That on October 3, 1980, true copies of the Opposition to Petition for Writ of Certiorari, addressed to the Attorney General of the State of California (counsel for petitioner) and to the Superior Court of Santa Clara County (respondent), have been deposited in a United States Post Office mail box in San Jose, California, as required by Rule 28.

Executed this 3rd day of October, 1980, at San Jose, California.

SHELDON PORTMAN
Public Defender
Santa Clara County, California

Sworn to and subscribed before
me this 3rd day of October, 1980.

NORWOOD A. NEDOM
Deputy Public Defender
(See Cal. Gov. Code §24057.)

APPENDICES

FILED

APPENDIX A

FILED
Filed NOV 29 1979
JOHN KAZUSOWSKI, Clerk
By [signature] Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. JOHN WAYNE GAMBLE, Defendant.	No. 73240 ORDER GRANTING MOTION FOR RECONSIDERATION AND, UPON RECONSIDERATION, SUSTAINING AND GRANTING DEMURRER/MOTION TO STRIKE

The motion by plaintiff for reconsideration of the Court's Order Sustaining and Granting Demurrer/Motion to Strike dated November 15, 1979, was, at the hearing of said motion for reconsideration, on November 26, 1979, granted by the Court.

Upon full reconsideration, it is now the order of the Court that the Demurrer/Motion to Strike by the defendant, John Wayne Gamble, seeking an order to strike the special circumstance alleged in Count One of the Information on file herein, which special circumstance alleges "that the foregoing murder was especially heinous, atrocious, and cruel, manifesting exceptional depravity as described in Penal Code Section 190.2(a)(14)," be

hereby sustained and granted.

The provisions of Penal Code Section 190.2(a)(14) do not provide an ascertainable standard of conduct or workable standard of guilt. Penal Code Section 190.2(a)(14) is unconstitutionally void for vagueness under due process requirements of both State and Federal constitutions.

DATED: This 29th day of November, 1979.

Judge of the Superior Court

The foregoing instrument is a correct copy of the original on file in this office.
ATTEST OCT - 3 1980
JOHN KAZUBOWSKI
County Clerk and ex-officio Clerk of the Superior Court of the State of California in and for the County of Santa Clara.
BY _____ DEPUTY
E. RODRIGUEZ

SUPERIOR COURT SANTA CLARA CO. CALIF.

5441A

APPENDIX B

FILED

Filed NOV 30 1972
JOHN KAZUBOWSKI, Clerk
By _____ Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ALLEN LEROY ENGERT, Defendant.	No. 72637 ORDER SUSTAINING AND GRANTING DEMURRER/MOTION TO STRIKE SPECIAL CIRCUMSTANCES UNDER PENAL CODE § 190.2(a)(14), AND DENYING MOTION TO DISMISS SPECIAL CIRCUMSTANCES UNDER PENAL CODE § 190.2(a)(18)

The demurrer/motion to strike by defendant, Allen Leroy Engert, the special circumstances alleged in Count One which allege that "said murder was exceptionally heinous, atrocious and cruel manifesting exceptional depravity," under Penal Code Section 190.2 (a)(14), is hereby sustained and granted.

The provisions of Penal Code Section 190.2(a)(14) do not provide an ascertainable standard of conduct or workable standard of guilt. Penal Code Section 190.2(a)(14) is unconstitutionally void for vagueness under due process requirements of both State and Federal constitutions.

In view of the foregoing ruling with respect to Penal Code Section 190.2(a)(14), it is not necessary to pass upon other issues raised regarding that section, including the motion to dismiss pursuant to Penal Code Section 995.

The motion by said defendant to dismiss the special circumstances alleged in Count One which state that "said murder was intentional and involved the infliction of torture," under Penal Code Section 190.2(a)(18), said motion being made pursuant to Penal Code Section 995, is hereby denied.

DATED: This 31st day of November, 1979.

Judge of the Superior Court

The foregoing instrument is a correct copy of the original on file in this office.
ATTEST OCT - 3 1980
JOHN J. ZUBOWSKI
County Clerk and ex-officio Clerk of the Superior Court of the State of California in and for the County of Santa Clara.
BY C. [illegible] DEPUTY
E. RODRIGUEZ

SUPERIOR COURT SANTA CLARA CO. CALIF.

5441A